IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 14 580457 A**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MICHAEL BRELO	)	**JOURNAL ENTRY DENYING THE**
	)	**STATE'S MOTION TO DISQUALIFY**
Defendant.	)	**DEFENDANT'S COUNSEL**

John P. O'Donnell, J.:

INTRODUCTION

Defendant Michael Brelo is a Cleveland police officer accused of the on-duty voluntary manslaughter of Timothy Russell and Malissa Williams on November 29, 2012. Brelo's five co-defendants are police department supervisors. Each co-defendant is charged with two counts of dereliction of duty in violation of section 2921.44(E) of the Ohio Revised Code.

Brelo has been represented since his arraignment on June 13, 2014, by attorneys Patrick D'Angelo, Thomas Shaughnessy and Fernando Mack. The co-defendants are all represented by different attorneys.

On July 14 the state filed a "notice of defense attorney Patrick D'Angelo's conflict of interest." By that filing, the plaintiff ostensibly sought to learn whether Brelo and the union of which he is a member – the Cleveland Police Patrolmen's Association – will voluntarily waive what the state claims is a conflict of interest: D'Angelo's past representation[1] of Brelo, the CPPA and other police officers the state expects to call as trial witnesses. But in the notice, the state

[1] D'Angelo has averred that he does not still represent any police officer witness in this case or the CPPA. His "only remaining client" is Brelo. (Defendant's reply to the state's request for information, filed February 9, 2015, page 2.) As a result I will examine the alleged conflict only under the rules pertaining to conflicts among a current client (Brelo) and past clients (the testifying officers).

refers at least three times to D'Angelo's continued representation of Brelo as a "hopeless"[2] and "unavoidable"[3] conflict of interest that cannot be cured by a waiver and which is sure to result in a reversal of any eventual conviction. Moreover, the state also requests that the court "ask for all of attorney D'Angelo's clients to waive their attorney-client privilege."[4]

On December 5 the state followed the "notice" of D'Angelo's alleged conflict of interest with an express motion to disqualify D'Angelo. The gist of the motion to disqualify is the same as the "notice" of conflict of interest, namely that D'Angelo cannot effectively represent Brelo at trial "due to [D'Angelo's] actual and potential conflict of interest"[5] because of his preindictment representation of police officers the state expects to call as witnesses at trial. I will construe the July 14 "notice" and the December 5 motion together as a single motion to disqualify D'Angelo.

Brelo opposes the motion[6] and this entry follows.

STATEMENT OF FACTS

The state alleges that Brelo committed the voluntary manslaughters in a parking lot in East Cleveland in the presence of about 25[7] other Cleveland police officers, all of whom are now likely witnesses at trial, and all of whom are members of the CPPA, the collective bargaining unit for nonsupervisory Cleveland police officers.

D'Angelo was an attorney for the CPPA.[8] He was retained to represent all of the CPPA members who were interviewed by investigators from the bureau of criminal investigation of the

[2] Plaintiff's notice of conflict of interest, filed July 14, 2014, pages 2, 8 and 9.
[3] *Id*., p. 10.
[4] *Id*., p. 14.
[5] Plaintiff's 12/5/2014 motion to disqualify, p. 1.
[6] The other briefs on the subject of D'Angelo's disqualification are: Brelo's 7/25/2014 "response in opposition," the state's 7/25/2014 reply, Brelo's 8/11/2014 supplement and his 12/10/2014 brief in opposition, the state's 12/16/2014 brief, Brelo's 2/2/2015 opposition, the state's 2/5/2015 hearing witness list, Brelo's 2/6/2015 hearing witness list, Brelo's 2/9/2015 "reply to state's request for information," and the state's 02/23/2015 motion for reconsideration of the decision to forgo an evidentiary hearing.
[7] The number of witnesses to the actual shooting is variously described as 23 or 26.
[8] Defendant's 7/25/2014 brief in opposition to the state's notice of conflict of interest, p. 2.

Ohio attorney general's office.[9] This amounted to at least 24 and as many as 68 police officers.[10] Of these, 13, including Brelo, were officers who used deadly force – i.e., shot their guns – on the night of the incident.[11]

Grand jury proceedings were instituted by the Cuyahoga County prosecutor after BCI closed its investigation without pursuing any criminal charges. The 13 officers who had used deadly force were called to the grand jury and D'Angelo counseled them to exercise their right under the Fifth Amendment of the United States Constitution to decline to testify.[12] Later, two of those officers – Michael Farley and Brian Sabolik – retained separate counsel and did testify to the grand jury under a grant of immunity.[13] Ultimately, only Brelo was indicted for crimes of violence arising from the use of a gun.

SUMMARY OF THE PARTIES' ARGUMENTS

The state claims that D'Angelo has an unavoidable conflict that will inevitably deprive Brelo of the effective assistance of counsel. According to the state, the conflict exists because D'Angelo is incapable of simultaneously fulfilling the professional duties he owes to Brelo, the union and the police officer witnesses because they all have divergent interests.

The state also expects that D'Angelo "will be put in a directly adverse position to his clients"[14] when he is called upon to cross-examine police officers testifying for the state at trial.

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[9] *Id*.
[10] The plaintiff's July 25, 2014, reply brief, at page 1, says D'Angelo represented 24 officers during BCI interviews; the July 14 notice of conflict refers, at page 8, to 26 officers, and page 6 of Brelo's July 25 opposition brief mentions D'Angelo representing "in excess of fifty" police officers preindictment. The state's December 5, 2014, motion to disqualify asserts at page 17 that D'Angelo represented 68 officers.
[11] Brief in opposition, p. 6.
[12] *Id*.
[13] *Id*.
[14] *Id*., p. 10.

According to the prosecution, this conflict will arise because the state expects its own witnesses to testify inconsistently with their prior statements.[15]

For his part, Brelo argues that he has the right to employ a lawyer of his choice and that his retention of D'Angelo to represent him at trial was made with full knowledge that D'Angelo represented many of the police witnesses at the investigatory and grand jury stages. Moreover, Brelo asserts that there is no conflict of interest, either actual or potential, especially since he is the only client of D'Angelo's who was indicted and the interests of the police witnesses previously represented by D'Angelo "are not adversarial"[16] to his.

LAW AND ANALYSIS

The Sixth Amendment to the United States Constitution, applicable to the states through the due process clause of the Fourteenth Amendment,[17] guarantees that in all criminal prosecutions the accused shall have the right to the assistance of counsel for a defense. The United States Supreme Court has held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Sixth Amendment commands that the accused be defended by the counsel he believes to be best. *Id.*, 146. The improper denial of a defendant's right to counsel of his choice is structural error that guarantees a reversal on appeal. *Id.*, 150.

But it is well established that the right to effective assistance of counsel carries with it a correlative right to representation that is free from conflicts of interest. *Bonin v. California*, 494 U.S. 1039, 1041 (1990). A conflict of interest may impair an attorney's ability to provide effective assistance to a defendant, and the failure to provide effective assistance of counsel in turn affects the fairness of a trial. And courts have an independent interest in ensuring that

[15] See, generally, *Id.*, p. 10-12.
[16] Brief in opposition, p. 17.
[17] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. *United States v. Wheat*, 486 U.S. 153, 160. Where a trial court finds that a defendant's attorney has an actual conflict of interest the court may disqualify that attorney to prevent the provision of ineffective assistance that may result from an attorney's attempts to serve two masters at the same time.

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. *Columbus Bar Ass'n v. Finneran*, 80 Ohio St. 3d 428, 430 (1997). The Ohio Rules of Professional Conduct codify specific duties an attorney owes to a client in the course of zealous advocacy, including providing competent representation to a client, maintaining confidentiality of information relating to a client's representation, exercising independent professional judgment and rendering candid advice.

The Rules of Professional Conduct anticipate that there will be times when a lawyer's duty to one client will conflict with a professional duty owed to another client. Prof. Cond. Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from thereafter representing "another person in the same or a substantially related matter in which" the current client's "interests are materially adverse to the former client." And Prof. Cond. Rule 1.7(a)(2) provides that representation of a current client creates a conflict of interest if

> there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

The first step in deciding whether there is a conflict between a current client and former clients is to determine their interests. It may seem that Brelo's interest, generally speaking, is to be acquitted. But while that may be the outcome he wants, his actual interest – the thing to which he is entitled – is a fair trial. A fair trial is one at which, among other things, he is given a

full opportunity to confront and cross-examine witnesses against him. Thus it can be said that to vindicate Brelo's general interest in a fair trial, D'Angelo's duty is to provide effective representation. In turn, effective representation can be provided only by a lawyer who will cross-examine the prosecution's witnesses unconstrained by a professional duty the lawyer owes to those witnesses to maintain any secrets and confidences they entrusted to him.

The state's witnesses at Brelo's trial who were represented by D'Angelo have an interest in making sure that he does not disclose – or, even worse, use against them – any secrets or confidences they reposed in him.

Besides D'Angelo's clients' respective interests – Brelo's in a fair trial, the witnesses' in preserving their confidences and secrets – the state also posits that D'Angelo, in representing the police witnesses during the investigation of the case, acted as "the architect and mason of the 'blue wall' of police officers"[18] behind which he is trying to hide Brelo. Here, the state essentially alleges that D'Angelo coached the witnesses to give "less than accurate, incomplete or inconsistent statements"[19] to BCI and the grand jury. According to the state, D'Angelo will be motivated to protect himself from disciplinary action against his law license at the expense of effective representation of Brelo. In short, the state claims that D'Angelo's "own personal interests"[20] conflict with Brelo's.

Having identified the trial participants' interests, the next step is evaluating whether they are directly adverse to each other. Since the different interests, in the abstract, are not necessarily adverse, a determination about whether they are directly adverse must take into account the evidence and the parties' competing theories of the case.

[18] State's July 14, 2014, notice of conflict, p. 9.
[19] *Id*., p. 11.
[20] Prof. Cond. Rule 1.7(a)(2).

The state and its experts in legal ethics foresee essentially two ways the interests of Brelo, the police witnesses and D'Angelo personally will collide at trial. First, in cross-examining the police witnesses, D'Angelo will "likely be called upon to utilize confidential information gathered during"[21] his representation of the witnesses. When that happens, either effective representation of Brelo will give way to preserving witness-client confidences, or D'Angelo will use the confidences in violation of his duty to the witness-clients. Second, if the police witness-clients give testimony "tending to establish that D'Angelo participated in an effort to withhold information or evidence from BCI or the [g]rand [j]ury" then his duty to Brelo will conflict with his own "self interest" in refuting professional misconduct allegations.[22]

Use of former clients' confidences and cross-examination

There is no doubt that at some point after November 29, 2012, D'Angelo provided representation to nearly all of the police witnesses the state intends to call at trial and I assume for the purposes of this motion that the witnesses entrusted him with confidences that are protected from disclosure by the attorney-client privilege. Among the witnesses he represented were the 12 officers besides Brelo who discharged their weapons. While those 12 face a greater exposure to future criminal charges than the officers who participated in the pursuit but did not shoot, in theory any of the witnesses might later be indicted for some crime connected with the events of November 29, 2012.

But in deciding whether their interests are materially adverse to Brelo's the evidence has to be examined practically, not theoretically. Practically speaking, in asserting that D'Angelo must either use their confidences against the witnesses or refrain and, in the process, fall short of

[21] Report of Jonathan Coughlan, Esq., p. 6. The prosecution's other legal ethics expert, Jack A. Guttenberg, Esq. makes essentially the same point when he says, at page 3 of his report, that having to cross-examine former clients may force D'Angelo to "choose whether to use information that [he] obtained from former clients to their detriment or to protect those former clients' confidences and not use this information in the defense of" Brelo.
[22] *Id*.

effectively representing Brelo, the state and its experts overlook that all of the witnesses have at least given statements to BCI and most of them have also testified to the grand jury. There is a record of their versions of events. If D'Angelo cross-examines them with the benefit of their prior statements he is necessarily not using any confidences and secrets they gave to him. And because they have all made statements D'Angelo can effectively cross-examine them without using any secrets. In that respect, D'Angelo will be in the same position to effectively represent Brelo as any other lawyer who doesn't know the witnesses' secrets.

To put it another way, by saying that D'Angelo cannot effectively cross-examine witnesses without using their secrets, the state is claiming that no lawyer can effectively cross-examine opposing witnesses without knowing their secrets. Such a contention is, to say the least, not supportable in logic, practice or fact.

Moreover, questions on cross based on private confidences instead of prior statements to investigators or the grand jury would begin "Didn't you tell me privately that . . .?" or words to that effect. If D'Angelo is rash enough to take that approach the state's sure objection would be sustained, leaving D'Angelo in the same position to cross-examine as any lawyer who was not given a witness' secrets.[23]

But the state goes further and argues not just that D'Angelo has to choose between effectively representing Brelo and protecting the confidentiality of witness-clients, but that he can't even cross-examine them as any other lawyer would. As legal ethics professor Jack A. Guttenberg, Esq., one of the state's experts, observes:

[23] I disagree with Guttenberg's assertion that D'Angelo is precluded from cross-examining police witnesses based on "anything he learned" while representing them, "regardless of the source of the information." (Guttenberg report, p. 7.) If that were the case then there would be no need for the waiver-of-conflict provisions in Prof. Cond. Rules 1.7 and 1.9 because there would be a blanket proscription on representation in all cases where cross-examination of a former client might be required. The duty to the client is to preserve confidentiality and none of the statements to investigators is confidential.

> D'Angelo may be called upon to vigorously cross-exam the witnesses called by the prosecution by raising questions as to the accuracy of their testimony, their memories of events, the veracity of their statements, and literally raising any other legitimate means of disparaging any witnesses that implicate [Brelo].[24]

Yet Guttenberg and the state's other legal ethics expert, Jonathan Coughlan, Esq., cite no rule prohibiting cross-examination of a former client. Instead, they assume that D'Angelo cannot effectively cross-examine without using confidences to opine that he therefore cannot cross-examine at all. Nor does the known evidence suggest that D'Angelo will violate a duty of loyalty to the witnesses by "vigorously" cross-examining them. Indeed, the evidence and the tone of the state's briefs accusing the witnesses of withholding information suggest that an effective cross-examination of these witnesses is a gentle one where Brelo's counsel will be more inclined to buttress their credibility than tear it down.

The state and its experts are probably correct in observing that since 13 people shot their guns and only one has been charged with causing the deaths, effective representation of Brelo will include raising doubt about whose bullets caused the deaths.[25] In fact it is quite obvious that the defense intends to proffer evidence to defeat the state's ability to prove causation beyond a reasonable doubt. For example, the report of proposed defense expert David M. Posey, M.D. says that both decedents received fatal gunshot wounds "prior to [Brelo's] last discharge of his

[24] Guttenberg report, supra, p. 2. See also Coughlan report, page 6: "[D'Angelo] will likely be called upon to utilize confidential information gathered during the former representation." Like Guttenberg, Coughlan does not square the assertion that D'Angelo can only represent Brelo effectively by using the confidences of the witness-clients with the reality that effective representation is provided all the time by counsel unfamiliar with the secrets of the opposing party's witnesses.

[25] Coughlan report, page 11: "One plausible defense theory would be to suggest that the occupants of the car were already dead from bullet wounds they received before Brelo fired his weapon into the car. If this theory is adopted, D'Angelo will have no choice but to shift blame for the deaths onto his other clients." Guttenberg report, p. 4: It may become "necessary to cast blame on other" police officers. The state's December 5 motion to disqualify, p. 18: "D'Angelo's defense strategy [may be] to shift the blame on to the uncharged officers for the deaths of Russell and Williams." The state's third expert, John P. Sahl, Esq., admits at page 2 of his report that he assumes that "a police chase and shooting resulted in Officer Brelo (Brelo) (sic) killing Timothy Russell and Malissa Williams." This assumption is inconsistent with the presumption of innocence and casts doubt on the objectivity of the entire report, hence I do not refer or allude to Sahl's report other than in this footnote.

weapon."[26] But this doesn't mean that the defense intends to prove that shots attributed to one or more specific officers other than Brelo caused the deaths. Even if it did, the duty D'Angelo owes to such officer is confidentiality and not a duty to refrain from suggesting the possibility that the other officer might have fired the fatal shots.

Here I believe the state is conflating the interest a witness has in preserving attorney-client confidentiality with the preference of a witness to avoid scrutiny or even exposure to criminal charges. But more to the point, the state's argument here conflicts with its own evidence. The prosecution has named Philip Bogdanoff as an expert witness on the subject of police use of deadly force. He testified to the grand jury and his report is part of the record in this case. His opinion, and the state's theory of the case, is:

> Except for the last shots fired by Officer Brelo, (*sic*) the police were justified in using deadly force based upon their reasonable belief at the time they fired their weapons that their life (*sic*) or the life of another officer was threatened with death or great bodily harm.[27]

Relying at least in part on Bogdanoff's opinion that if another officer's bullets caused the deaths then that officer was justified, the state sought to indict Brelo only. Since then, the prosecution has notified the other "shooters" that they do not remain under grand jury investigation and are not being considered for indictments "for their actions in discharging their weapons."[28] So the state's own evidence defeats their legal ethics experts' assertions that aggressive cross-examination of police witnesses by D'Angelo is either necessary or will expose them to potential liability for criminal conduct.

In *United States v. Farmer*, N.D. Ohio No. 1:14 CR 362, 2015 U.S. Dist. LEXIS 4483 (Jan. 14, 2015), the prosecution sought to disqualify Farmer's counsel on the basis that his

[26] Posey January 5, 2015, report, p. 20.
[27] Bogdanoff report (there is no date on the copy I have seen), p. 67.
[28] Prosecutor's June 25, 2014, letter to the CPPA.

attorney also represented another client in connection with the same criminal investigation that resulted in the charges against Farmer and the prosecutor intended to call that other client as a witness at trial. The government argued that because the witness would have to be cross-examined by her own lawyer then Farmer would have a ready-made ineffective assistance of counsel argument on appeal on the basis that his lawyer was "forced to abandon legitimate lines of cross-examination" of the client-witness in deference to the lawyer's ethical duties to the witness.

In denying the government's motion to disqualify Farmer's counsel, the district court said that "[t]hese purely 'hypothetical' conflicts simply are not likely to burgeon into the type of conflict . . . that could give rise to an ineffective assistance of counsel argument on appeal." *Id*., 16. And so it is here: I am unwilling to believe that the prosecutor will go back on his word and pursue criminal charges against the other "shooters," and any conflict arising from D'Angelo arguing that another person's bullets caused the deaths is purely hypothetical.

D'Angelo's alleged interest in concealing his obstruction of the investigation

The state offers another argument in support of finding an irreconcilable conflict of interest between Brelo and the witnesses. I am not confident that I can tersely and accurately paraphrase this argument. It has been articulated by the state in various ways. In its July 14 notice of a conflict of interest, the state says

> [D'Angelo] advised, counseled, and sat next to 26 officers, both shooters and non-shooters, as [BCI] interviewed each of the officers as part of the criminal investigation … Because of his position as the CPPA's attorney in the time leading up to Brelo being indicted for two counts of voluntary manslaughter, attorney D'Angelo will be seen as the architect and mason of the "blue wall" of police officers – including numerous officers who saw a man atop the victim's hood shooting his weapon downward into the car's windshield. In so doing, attorney D'Angelo seeks to hide one client, Brelo, behind his "blue wall" of 1,449 other clients. This fails to serve the interests of Brelo, the CPPA, and justice in this case. Without a waiver, attorney D'Angelo's continued presence

> creates a hopeless conflict permeating the entire case with infectious and reversible error.[29]

The prosecutor then proceeds to give examples of how the conflict will manifest itself at trial and impede D'Angelo's ability to effectively represent Brelo:

> Many of the testifying police officers were under the counsel and advisement of attorney D'Angelo before, during, and after their statements to BCI and the grand jury. As a result, the State of Ohio anticipates it will ask the testifying officers questions regarding . . . who the officers spoke to and when they spoke to them regarding their statements; whether or not they conferenced with attorney D'Angelo regarding their statements; whether or not they changed their statements about Brelo being on the hood of the victim's car at any point; and why their statements changed . . . A jury will be able to see the influence attorney D'Angelo has on each and every one of his union clients as they are asked whether or not they talked to their union attorney before, after, and during their statements to BCI or testimony before the grand jury or making a decision whether to cooperate with the investigation at all. This actual conflict of interest will be evident and unavoidable, and it may be eventually known by the jury that an attorney spoke with officers before they made less than accurate, incomplete, or inconsistent statements . . . The shear (*sic*) existence of those inconsistent statements creates a conflict that would cause an appellate court to reverse a conviction if a trial court did not . . . remove the attorney from the case.[30]

The state went on as follows in its July 25 reply to Brelo's opposition to the notice of conflict:

> The damage of the conflict of interest is already done and it is a direct result of attorney D'Angelo's apparent construction and use of the "blue wall." He successfully delayed the investigation and will likely continue to hide behind his wall during future proceedings . . . It is readily apparent that attorney D'Angelo will place himself directly adverse to his own clients and use his prior experiences with his clients in this case to his advantage . . . [H]e could anticipate what kind of questions the State of Ohio will be asking. Questions, and their subsequent answers, that very well could implicate himself and his role as the legal counsel for the CPPA and its members.[31]

According to the state, the failure to disqualify D'Angelo "will prohibit the State of Ohio from its own fair trial – condoning attorney D'Angelo's tactics of constant delay and his

[29] State's July 14 notice of conflict, p. 8-9.
[30] *Id*., p. 10-11.
[31] State's July 25 reply brief, p. 25-26. At page 27 of that same brief, the state makes the startling assertion that during direct examination of its trial witness it may inquire into matters that are subject to the attorney-client privilege. Startling because while it is acceptable to ask a witness if she conferred with counsel before giving a statement or testifying it is not acceptable to ask what was said between the attorney and the client.

disingenuous use of police officers as bricks in his 'blue wall.'"[32] That blue wall attained proper noun status when the state, in its December 5 motion to disqualify, described the conflicting interests as not only between Brelo and the witnesses but between Brelo and D'Angelo personally:

> [W]hen trial testimony by the various police officers and dispatchers in this case confirms that Mr. D'Angelo is indeed the architect and mason of the "Blue Wall," Mr. D'Angelo will be faced with yet another conflict of interest and ethical quandary. He will have to begin to not only defend Brelo, but also himself . . . as he teeters along the thin line of prejudicing the administration of justice. Such defense tactics by Mr. D'Angelo will create a conflict between himself and his own client Brelo.[33]

It was in that motion too that the state expressly conceded its intent "to establish that Mr. D'Angelo participated in an effort to withhold information or evidence from BCI, East Cleveland police [and] the grand jury."[34] The state was just as blunt in its February 23 motion for reconsideration, saying that it "will present evidence during trial that will allow the jury to infer that Mr. D'Angelo is instrumental in a 'cover-up' and/or 'conspiracy of silence' by members of the Cleveland Police Department."[35] The prosecution concludes that because of this alleged conspiracy:

> When the facts of this motion are put before a jury at trial, the jury will have absolutely no trust in Mr. D'Angelo. They will think he is part of a "conspiracy of silence" along with all of the other CPPA officers and dispatchers called as witnesses in this case. A conspiracy to withhold vital evidence in an effort to protect Brelo from prosecution.
>
> At this point, Mr. D'Angelo will be faced with a very real and very personal conflict of interest – he must defend himself at trial. Not only will this defense of himself require Mr. D'Angelo to regain credibility from the jury during closing arguments, but it will also distract him from providing effective conflict-free assistance of counsel to defendant Brelo.[36]

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[32] *Id*., p. 27.
[33] State's December 5 motion to disqualify, p. 6.
[34] *Id*., p. 20. Similar verbiage was included in the experts' reports attached to the motion.
[35] State's February 23 motion for reconsideration, p. 2.
[36] *Id*., p. 20-21.

To support the alleged conspiracy, the state repeats the claim that if police officers testify at trial to "anything in contravention of what was said to Mr. D'Angelo during his active representation of"[37] those witnesses then D'Angelo will be unable to effectively cross-examine them. Again, however, the state fails to demonstrate how D'Angelo would be hamstrung from effective cross-examination if he can't use the witnesses' confidences, but a lawyer who doesn't know the confidences in the first place can effectively cross-examine.

The state goes on to offer examples of D'Angelo's imperative to "defend himself at trial." The prosecutor points first to the fact that witness James Hummel "made no mention of Brelo's firing position"[38] during a BCI interview where Hummel was accompanied by D'Angelo and two officers of the CPPA, and asserts that Hummel's omission supports a conclusion that D'Angelo "acted improperly in the shaping of officer Hummel's statements to BCI."[39] Here the state fails to distinguish between a question not answered because it wasn't asked and a question put to a witness and answered with a lie. There is no direct evidence that Hummel lied in his statement to BCI, and if he wasn't asked about "Brelo's firing position" he did nothing wrong by not offering that information unbidden. Similarly, the state finds something sinister in the fact that "as many as seven officers, five of them shooters, failed to inform BCI about any officer being on the hood of the victims' car."[40] At the same time, the prosecution concedes that BCI did not ask questions about the subject. If D'Angelo prepared clients for interviews by instructing them not to answer questions that aren't asked he is guilty only of giving sound and time-tested advice, not a conspiracy of silence.

[37] *Id*., p. 4.
[38] *Id*., p. 9.
[39] *Id*., p. 10.
[40] *Id*., p. 12.

The trial strategy of suggesting that witnesses colluded to get their stories straight is often used and unremarkable. It is not for me to offer an opinion on its effectiveness.[41] It is enough to say that if the direct evidence necessary to support the inference is correctly admitted at trial then it is a legitimate argument. But there is no direct evidence that witnesses described a version of events that was only what D'Angelo told them to say and was not what they observed. Without that evidence, the plaintiff's tactical decision to pursue a "conspiracy of silence" theory of the case is not enough to warrant D'Angelo's disqualification. Moreover, the witnesses and Brelo have all already been represented by D'Angelo and disqualifying D'Angelo at this point would not defeat the state's ability to make the same argument.

CONCLUSION

The record in this case does not demonstrate an actual conflict of interest, and the potential for a conflict of interest to materialize as the trial proceeds is low. That remote possibility of a conflict of interest does not outweigh Brelo's constitutional right to counsel of his choice and the state's motion to disqualify D'Angelo is denied.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

[41] I do, however, note that it is unusual for a party to say or imply that its own witnesses coordinated their statements.

SERVICE

A copy of this journal entry was sent by email on March 17, 2015, to the following:

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Judge John P. O'Donnell